Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STEVEN ROBERT BRITENBACH

Petitioner

-vs-

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Sentencing Commission exceeded its jurisdictional authority in designating conspiracy to commit a narcotics offense as a predicate for application of the "career offender" guideline.

2. Whether the Appellate Court erred in validating the trial court's refusal of petitioner's trial continuance motion.

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The petitioner, Steven Robert Britenbach, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on 24 January 1994.

I.

PARTIES TO THE ACTION BELOW

The parties to the action in the Court of Appeals were petitioner, co-defendants Wayne Rodney Heim, Dyan Jones, and Dwayne Keith Fitzen, and respondent United States of America.

II.

OPINIONS BELOW

On January 24, 1994, the Court of Appeals entered two opinions in petitioner's case. The first opinion, which was ordered published, confined itself to petitioner's contention that he was improperly sentenced as a career offender and ultimately upheld the sentence imposed based upon that classification. The second, unpublished, opinion dealt with the balance of petitioner's contentions as to the validity of the convic-

tions themselves, including petitioner's contention that he was deprived of adequate counsel at trial by virtue of the trial court's refusal to grant counsel a reasonable continuance to prepare the case. The Court of Appeals upheld petitioner's convictions in all respects. The published opinion, and that portion of the unpublished opinion dealing with the continuance issue, are attached hereto as Appendix A.

III.

JURISDICTION

On January 24, 1994, the Court of Appeals entered its dual opinion sustaining petitioner's convictions after trial and the career offender sentence imposed. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

IV.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Amendment VI, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

Title 28, United States Code, Section 994(a)(2):

> (a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate

and distribute to all courts of the United States and to the United States Probation System --

. . . .

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code. . . .

Title 28, United States Code, Section 994(h):

(h) The Commission shall assure that the guidelines

specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and --

(1) has been convicted of a felony that is --

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a),

955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); and

(2) has previously been convicted of two or more prior felonies, each of which is --

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a),

955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a).

Federal Sentencing Guideline No. 4B1.1:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. . . .

Federal Sentencing Guideline No. 4B1.2(2):

> The term "controlled substance offense" means an offense under a federal or state law prohibiting the manufacturing, import, export, distribution of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense.

Application Note 1 to Guideline 4B1.2:

> The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiracy and attempting to commit such offenses.

V.

STATEMENT OF THE CASE

On February 13, 1992, a multi-count indictment was filed in the United States District Court for the District of Idaho charging petitioner's co-defendants Fitzen and Heim with a narcotics distribution conspiracy and various ITAR and telephone counts related to that conspiracy (Clerk's Record, hereafter "C.R.", 1). Counsel for said co-defendants were appointed on February 25, 1992 (C.R. 3, 7). On March 13, 1992, a superseding indictment was filed, naming additional co-defendants (not petitioner Britenbach) in the alleged narcotics conspiracy (C.R. 18). A second superseding indictment was filed on May 14, 1992, which added petitioner herein as a named defendant for the first time (C.R. 128). Petitioner

was arrested on the warrant generated by said superseding indictment on May 27, 1992 (C.R. 139).

Petitioner was not arraigned on the second superseding indictment which named him until June 19, 1992 (C.R. 148). Trial on said superseding indictment was set for August 11, 1992 (C.R. 148). Petitioner's trial counsel, J. Michael Wheiler, Esq., was not formally appointed until July 2, 1992, 40 days before the trial commenced (C.R. 155).

A third superseding indictment was filed on July 15, 1992, which pleading enlarged the alleged time frame for the claimed narcotics conspiracy (Appellant's Excerpt of Record, hereafter "AER", 1). On July 16, 1992, petitioner's counsel filed a motion for continuance of the trial date (AER 12). Petitioner was

arraigned on the third superseding indictment on July 20, 1992 (C.R. 176). Petitioner's motion for continuance of the trial date was denied by order of the District Court on July 28, 1992 (AER 15). On August 3, 1992, petitioner's trial counsel filed a motion to reconsider the denial of a continuance (AER 29). On August 11, 1992, the trial herein commenced after petitioner's counsel renewed his motion for continuance, which request was denied (Reporter's Transcript, hereafter "R.T.", 1-28).

The jury trial herein concluded on August 28, 1992, with the jury finding petitioner Britenbach guilty as to the conspiracy count and substantive ITAR and telephone use counts alleged against him. Petitioner was sentenced on November 23, 1992, to a thirty-year term as to Count 1

(conspiracy), with a five-year term as to each of the other counts, to run concurrently with each other and with the thirty-year term imposed on Count 1.

On December 1, 1992, petitioner filed his timely Notice of Appeal from the November 23, 1992, judgment and sentence committing him to the custody of the Attorney General for thirty-five years.

Petitioner contended on appeal that the denial of the requested trial continuance was an abuse of discretion violating his right to adequately prepared counsel and raised other substantive matters not relevant to the instant petition.

Shortly before oral argument on the appeal, counsel for petitioner discovered the case of United States v. Price,

990 F.2d 1367 (D.C. Cir. 1993), which held that a conspiracy conviction was not a valid or lawful predicate for application of the career offender sentence guideline. By letter, counsel informed the Appellate Court of the existence of the Price case and noted that, although the Price issue had not been raised in filed briefs, the opinion did raise serious questions regarding the legality of petitioner's sentence. At the oral argument on the appeal, the court requested that counsel submit supplemental briefs on the Price issue, and that aspect of the case was submitted to the court on said supplemental briefs without oral argument.

Respecting the specific sentencing question, which is the central and most important issue herein, the record below

discloses that petitioner was sentenced as a career offender on the specific ground that he was convicted of a conspiracy to distribute narcotics and had suffered two prior narcotics convictions, one of which was itself a conspiracy offense. The Price case, upon which petitioner relied, unequivocally held that a conspiracy conviction is not a valid predicate for career offender treatment because "conspiracy" was not an enumerated offense in the legislation which authorized the Sentencing Commission to create a "career offender" classification (28 U.S.C. § 994(h)). Moreover, the Price court concluded that the Sentencing Commission, as an administrative agency, is not entitled to the measure of judicial "due deference" afforded to legislative bodies, particu-

larly when its decisions or pronouncements conflict with express statutory language. This thesis has been accepted as controlling in United States v. Spencer, 817 F.Supp. 176 (D.C. Cir. 1993).

The Ninth Circuit, in its published opinion in petitioner's case, expressly rejected the Price rationale and ruled that the Sentencing Commission's inclusion of conspiracy as a predicate to "career offender" status was a lawful exercise of authority. In so holding, the Ninth Circuit opined that the Commission was "implementing the mandate" of Section 994(h) and further held that the Commission could validly expand the list of predicate offenses under the general "policy statement" authority conferred by 28 U.S.C. Section 994(a)(2).

As a secondary, but fundamental, issue herein, petitioner contends that he was deprived of adequately prepared counsel at his trial, due to the erroneous and arbitrary denial of a continuance motion made by trial counsel. As noted previously, petitioner's trial counsel was officially appointed only 40 days before trial, upon an indictment alleging 35 counts linked under the overall allegations of a single narcotics conspiracy. The final, amended version of the indictment was filed only 27 days before trial. The trial itself generated 1960 pages of testimony by 28 witnesses and 186 exhibits placed into evidence by the government.

On July 16, 1992, one day after the final amended indictment was filed, petitioner's trial counsel filed a

continuance motion, asserting that he could not adequately prepare the case due to voluminous discovery materials and the existence of numerous witnesses. Said motion was denied by order of the court on July 28, 1992, which held that defense counsel "voluntarily undertook this appointment with full knowledge of the impending trial," that because the government had worked with co-defendants' counsel for several prior months it "was in a better position to prepare and provide discovery material," that "the government contends the evidence to be used against Britenbach comes primarily from Britenbach's own statements," and thus the difficulty of preparation was not so great as to require a continuance (AER 16-17). Counsel moved twice more for reconsideration of this order, by

motion on August 3, 1992, and on the morning of trial. Counsel stressed that the government did not oppose a continuance if it was made applicable to all defendants and noted that the case against defendant would encompass much testimony and evidence other than the purported statements of defendant himself. In response, the prosecution again stated that "95 percent of the information the jury will rely on to convict Mr. Britenbach comes out of his own mouth . . . and has very little to do with confidential informants, or anything else." (R.T. I, 12.) The renewed motions for continuance were likewise denied.

On appeal, petitioner noted that the prosecutorial characterization of the evidence against Mr. Britenbach was false

in that the vast bulk of the evidence presented was in fact the testimony of informants. In its pleadings before the Court of Appeals, the prosecution never denied the falsity of its assertions to the trial court.

The Court of Appeals held that the trial court cited "sufficient legitimate reasons" to deny a continuance and that petitioner had failed to demonstrate prejudice to his defense, despite the fact that trial counsel himself had forthrightly advised the trial court that he was not comfortable "with my understanding and my ability to comprehend all of the information that has been given to me" (R.T. I, 2) and despite petitioner's showing of the introduction of at least five critical and incriminating hearsay statements by informant witnesses which

were not objected to by counsel because he did not grasp the scope of the conspiracy alleged.

VI.

REASONS FOR GRANTING THE WRIT

A. The Sentencing Issue Presented Herein Requires this Honorable Court's Prompt Resolution.

Petitioner's case comes before this Honorable Court as a clear example of a split of published authority on an issue of critical importance to the administration of justice in the federal criminal court system. The question at stake is facially quite simple, i.e., whether or not the federal Sentencing Commission may validly expand the list of offenses which will trigger career offender status for sentencing purposes. But underlying this question is a deeper and more fundamental

inquiry, that is, the extent to which the pronouncements of the Sentencing Commission are to be afforded the same aura of "due deference" which is applied to the enactments of legislative bodies. This question lies at the heart of the split in opinion between the District of Columbia and the Ninth Circuit courts of appeal. Resolution of such appellate level divergencies of opinion constitute a central aspect of this Honorable Court's historical mandate. It cannot be disputed that the issue itself entails some measure of urgency in its resolution for the sake of defendants across the nation who face the prospect of possible application of a harsh "career offender" sentence and the district courts which are called upon to apply that guideline.

B. **The Continuance Issue Raises New Questions Concerning the Parameters of the Constitutional Right to Adequately Prepared Counsel.**

The denial of petitioner's requests for trial continuance below were based at bottom on the holding that petitioner's trial counsel had "volunteered" to accept an inadequate period of trial preparation by accepting his appointment as petitioner's counsel and the false assertions of the prosecution concerning the character of the evidence which would be proffered against petitioner. As recently as 1993, in Lockhart v. Fretwell, 113 S. Ct. 838 (1993), this Honorable Court reiterated the established principle that the Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial, and that the right to the

effective assistance of counsel is recognized not for its own sake but because of the effect it has on the ability of the accused to receive a fair trial. The instant case presents two unique forms of assault on the right to counsel which merit this Court's express condemnation. First, the trial court's continuance denial was based in part on the proposition that when an attorney accepts appointment as a defense counsel he takes the case as he finds it and impliedly waives any right to a reasonable continuance in order to adequately prepare for trial. The Ninth Circuit validated this holding as a "legitimate reason" for the denial of a continuance. If that logic is permissible, appointed counsel across the nation should be so informed so that they may intelligently decide whether to

accept an appointment which might carry with it an implied waiver of adequate preparation time.

Second, the trial court's continuance ruling was tainted by the government's false assertions regarding the nature of the case and its evidentiary underpinnings. The Ninth Circuit wholly ignored this aspect of the issue in its ruling, thereby implying that this governmental conduct was irrelevant or de minimis in importance to the right to adequate counsel. It is inconceivable that such conduct can be condoned when it demonstrably results in a performance of defense counsel who did not comprehend the nature and scope of the conspiracy allegation he was called upon to defend against. Counsel for petitioner therefore urges the adoption of a rule which

creates a per se finding of Sixth Amendment violation when the government opposes a continuance of trial by misleading the court (and defense counsel) as to the nature of the evidence to be presented.

VII.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Date: 9-22-94 Respectfully submitted

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APPENDIX "A"

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. WAYNE RODNEY HEIM; DYAN JONES; STEVEN ROBERT BRITTENBACH; DWAYNE KEITH FITZEN, *Defendants-Appellants.*	Nos. 93-30090 93-30091 93-30092 93-30101 D.C. No. CR-92-021-EJL OPINION

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued, Submission Deferred November 1, 1993
Submitted November 15, 1993
Seattle, Washington

Filed January 24, 1994

Before: Thomas Tang, Jerome Farris and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Farris

SUMMARY

Criminal Law and Procedure/Sentencing/Conspiracy

The court of appeals affirmed a district court judgment of sentence. The court held that the Sentencing Commission did not exceed its authority by including conspiracy within the

definition of "controlled substance offense" in career offender Guidelines.

Appellant Steven Britenbach was convicted of conspiracy to distribute controlled substances. The district court sentenced him as a career offender under Sentencing Guidelines § 4B1.1, which provides requirements for a defendant to be a career offender. One such requirement is that the instant offense of conviction be a felony that is either a crime of violence or a controlled substance offense. The commentary to § 4B1.2 states that the term "controlled substance offense" includes the offense of conspiring to commit a controlled substance offense.

Britenbach appealed his sentence, contending, among other things, that the Sentencing Commission exceeded its statutory authority by including conspiracy within the definition of a "controlled substance offense."

[1] The Commission properly included conspiracy within the definition of "controlled substance offense." [2] In deciding to include conspiracy within the definition for purposes of determining the offense level of career offenders, the Commission was lawfully exercising its authority under 28 U.S.C. § 994(a)(2). Nowhere in the commentary to § 4B1.1 did the Commission suggest that it considered § 994(h) to be the sole legal authority for promulgating the career offender Guidelines.

COUNSEL

Monte R. Whittier, Whittier, McDougall, Souza, Murray & Clark, Pocatello, Idaho, for defendant-appellant Dwayne Keith Fitzen.

Steven V. Richert, Green, Service, Gasser & Kerl, Pocatello, Idaho, for defendant-appellant Wayne Rodney Heim.

Nicholas DePento, San Diego, California, for defendant-appellant Steven R. Britenbach.

Kelly Kumm, Jones, Chartered, Pocatello, Idaho, for defendant-appellant Dyan Jones.

Monte J. Stiles, Assistant United States Attorney, Boise, Idaho, for the plaintiff-appellee.

OPINION

FARRIS, Circuit Judge:

Wayne Rodney Heim, Dwayne Keith Fitzen, Dyan Jones and Steven R. Britenbach appeal their convictions for conspiracy to distribute controlled substances in violation of 18 U.S.C. §§ 841(a)(1) and 846. Britenbach also appeals his convictions on six counts of violating the Travel Act, 18 U.S.C. § 1952. All four defendants appeal their sentences. We have jurisdiction over their appeals pursuant to 28 U.S.C. § 1291. The convictions of all four co-defendants and the sentences of Heim, Fitzen and Jones are affirmed in a separate unpublished disposition. In this opinion, we affirm Britenbach's sentence.

I. FACTS

The evidence at trial established that defendants Heim, Fitzen, Jones and Britenbach conspired to distribute controlled substances in violation of 18 U.S.C. §§ 841(a)(1) and 846. During the course of the conspiracy, Fitzen, Heim and Jones resided in Pocatello, Idaho while Britenbach operated in Southern California. Britenbach and, to a lesser extent, co-defendant Mike Luce (who pleaded guilty) supplied cocaine and marijuana to the Pocatello co-conspirators.

The district court sentenced Britenbach as a career offender under § 4B1.1 of the United States Sentencing Guidelines.

Section 4B1.1 provides that a defendant is a career offender if

> (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1. The commentary to § 4B1.2 states that the term "controlled substance offense" includes the offense of conspiring to commit a controlled substance offense. U.S.S.G. § 4B1.2 comment. (n.1).

In finding that Britenbach was a career offender, the district court relied on two prior controlled substance felony convictions (a 1975 conviction for importation of controlled substances and a 1985 conviction for possession of narcotics with the intent to distribute) and the instant conspiracy conviction.

II. Use of Conspiracy Conviction Toward Career Offender Status

[1] Britenbach argues that the United States Sentencing Commission exceeded its statutory authority by including conspiracy within the definition of a "controlled substance offense." He relies on *United States v. Price*, 990 F.2d 1367 (D.C.Cir. 1993) for this proposition. We reject his argument. The Sentencing Commission properly included conspiracy within the definition of "controlled substance offense."[1]

[1]Other Circuits have accepted the inclusion of conspiracy as a predicate offense under the career offender guidelines. *See United States v. Flore*, 983 F.2d 1 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 1830 (1993); *United States v. Whitaker*, 938 F.2d 1551 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 977 (1992); *United States v. Jones*, 898 F.2d 1461 (10th Cir.), *cert. denied*, 498 U.S. 838 (1990).

We review the legality of a sentence de novo. *United States v. Fine*, 975 F.2d 596, 599 (9th Cir. 1992) (en banc). The commentary to § 4B1.1 explains that "28 U.S.C. § 994(h) mandates that the Commission assure that certain 'career' offenders, as defined in the statute, receive a sentence of imprisonment 'at or near the maximum term authorized.' Section 4B1.1 implements this mandate." U.S.S.G. § 4B1.1, comment. (backg'd). The pertinent language in § 994(h) provides that

> [t]he Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and . . . has been convicted of a felony that is . . . a crime of violence[,] or an offense described in section 401 of the Controlled Substances Act (21 U.S.C. § 841) . . . and . . . has previously been convicted of two or more prior felonies, each of which is . . . a crime of violence[,] . . . or an offense described in section 401 of the Controlled Substances Act . . . .

28 U.S.C. § 994(h). Section 401 of the Controlled Substances Act prohibits substantive controlled substance offenses, but makes no mention of conspiracy. 21 U.S.C. § 841. In *Price*, the court reasoned that "[a] conspiracy to commit a crime involves quite different elements from whatever substantive crime the defendants conspire to commit" and therefore conspiracy to violate the Controlled Substances Act "cannot be said to be one of the offenses 'described in' " § 401 of the Act. *Price*, 990 F.2d at 1369. The court held that because the Commission had relied on § 994(h) as the enabling statute for adopting §§ 4B1.1 and 4B1.2, the Commission had offered a "legally invalid" reason for including conspiracy within the definition of "controlled substance offense." *Id.* at 1370.

[2] The commentary to § 4B1.1 should be read less restrictively. It indicates that the career offender guidelines were intended to "implement[ ] the mandate" of § 994(h). The language means what it says—the Commission intended to implement the mandate of § 994(h). Nowhere in the commentary to § 4B1.1 does the Commission suggest that it considered § 994(h) to be the sole legal authority for promulgating the career offender guidelines. *Cf. United States v. Parson*, 955 F.2d 858, 866-67 (3d Cir. 1992) (holding that definition of "crime of violence" in career offender guidelines is not restricted to definition contained in § 994(h)). Elsewhere in the Guidelines, the Commission has explained that "[t]he guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code." U.S.S.G., Ch. 1, Part A, § 1. Section 994(a)(2) provides that the Commission shall promulgate "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code . . . ." 28 U.S.C. § 994(a)(2). Therefore, in deciding to include conspiracy within the definition of "controlled substance offense" for purposes of determining the offense level of career offenders, the Commission was lawfully exercising its authority under § 994(a)(2).[2]

The Commission's decision to go beyond the mandate of § 994(h) is also consistent with the legislative history to § 994(h). The Senate Report made clear that § 994(h) was not intended as a ceiling for establishing career offender guidelines: "[Section 994(h) is] not necessarily intended to be an

[2]The *Price* court noted that the Commission "may well be free" to include conspiracy within the definition of controlled substance offense pursuant to the Commission's broad mandate in 28 U.S.C. § 994(a). *Price*, 990 F.2d at 1369. However, there is no indication that the *Price* court considered the Commission's explanation that the Guidelines were, in fact, promulgated pursuant to the Commission's general authority in § 994(a).

exhaustive list of types of cases in which the guidelines should specify a substantial term of imprisonment, nor of types of cases in which terms at or close to authorized maxima should be specified." S.Rep. No. 98-225, 98th Cong., 1st Sess. 307 (1983), in 1984 U.S.C.C.A.N. 3182, 3359.

We hold that the Sentencing Commission did not exceed its statutory authority in including conspiracy within the definition of "controlled substance offense" in §§ 4B1.1 and 4B1.2.

III. Inclusion of Britenbach's 1975 Offense

Britenbach also asserts that the district court erred in counting the earlier of his two prior felony convictions (the 1975 conviction for importation of cocaine) toward career offender status.

The district court's application of the Sentencing Guidelines is reviewed de novo. *United States v. Fagan*, 996 F.2d 1009, 1017 (9th Cir. 1993). Factual findings in the sentencing phase are reviewed for clear error. *United States v. Chapnick*, 963 F.2d 224, 226 (9th Cir. 1992).

Prior felony convictions can count toward career offender status if they resulted in a prison sentence in excess of one year and one month and if the defendant was incarcerated for that sentence during the 15 year period preceding defendant's involvement in the instant offense. *See* U.S.S.G. §§ 4B1.2 comment. (n.4), 4A1.2(e)(1).

Britenbach was arrested in New York for importation of controlled substances in 1975. While he was released on bond for that arrest, he was arrested in Mexico on drug charges. He was incarcerated in Mexico until 1978 when he was returned to New York on a prisoner exchange. The New York charges were then resolved by crediting him for time served in Mexico and requiring him to serve the balance of his term in a New York prison until 1980. Britenbach argues that he should

not have been attributed career offender status because he was unable to resolve the charges from his New York arrest in 1975 (potentially over 15 years before his involvement in the instant conspiracy).

Britenbach's argument lacks merit. Under the Guidelines, a conviction for which a defendant is serving a sentence during the applicable 15 year period counts toward career offender status. The ultimate resolution of the New York charges resulted in Britenbach's serving time in New York from 1978-1980 *and* he was given credit for time served in Mexico. The district court made the factual finding that Britenbach first became involved in the instant conspiracy in January 1991 (11 years after his 1980 release date). Britenbach would have been within the fifteen year statutory range even if he had only served a one year sentence in New York beginning in 1975. The district court properly included the 1975 controlled substance offense as a "prior felony" conviction under § 4B1.1.

IV. The District Court's Failure to Depart Downward

Britenbach argues that the district court failed to realize that it had the authority to depart downward based on his age and medical condition. The record fails to suggest that the district court was under the impression that it could not depart downward if it chose to do so. A district court's discretionary refusal to depart from the Sentencing Guidelines is not reviewable on appeal. *United States v. Morales*, 972 F.2d 1007, 1011 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1665 (1993).

AFFIRMED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	CA No. 93-30090
	CA No. 93-30091
	CA No. 93-30092
Plaintiff-Appellee,	CA No. 93-30101
v.	DC No. CR-92-021-EJL
WAYNE RODNEY HEIM	
DYAN JONES	
STEVEN ROBERT BRITENBACH	MEMORANDUM*
DWAYNE KEITH FITZEN	
Defendants-Appellants.	

FILED

JAN 24 1994

CINDY A. CATHCART, CLERK
U.S. COURT OF APPEALS

Appeal from the United States
District Court for the
District of Idaho
Edward J. Lodge, District
Judge, Presiding

Argued and Submission
Submitted November 15, 1993
Seattle, Washington

Before: TANG, FARRIS and RYMER, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

Defendants Wayne Rodney Heim, Dwayne Keith Fitzen, Steven R. Britenbach and Dyan Jones appeal their convictions for conspiracy to distribute controlled substances in violation of 18 U.S.C. §§ 841(a)(1) and 846. Defendant Britenbach also appeals his convictions under 18 U.S.C. § 1952 on six counts of interstate travel and telephone use in furtherance of racketeering. All four defendants appeal their sentences. In addition, Britenbach appeals the district court's denial of his motion for a continuance. Jones also appeals the district court's denial of her motion for severance. Finally, Heim alleges a due process violation. We have jurisdiction over their timely appeals pursuant to 28 U.S.C. § 1291. We affirm the convic-

tions of all four defendants and the sentences of Heim, Fitzen and Jones. We also affirm the denial of Britenbach and Jones' motions and find no merit in Heim's due process argument. Britenbach's appeal of his sentence is addressed in a separate published opinion.

I. Denial of Britenbach's Motion to Continue

Britenbach argues that the district court erred in denying his motion to continue the trial because his trial counsel was appointed only forty days before trial. He also contends that the district court improperly relied on the fact that his trial counsel had voluntarily accepted appointment to the case. Britenbach relies upon numerous examples of hearsay that was admitted

against him without objection to demonstrate that he was prejudiced by the denial of his motion for continuance.

We review the denial of a motion to continue for abuse of discretion. United States v. Robinson, 967 F.2d 287, 291 (9th Cir. 1992). In determining whether a denial was fair and reasonable, we consider "whether the continuance would inconvenience witnesses, the court, counsel, or the parties; whether other continuances have been granted; whether legitimate reasons exist for the delay; whether the delay is the defendant's fault; and whether a denial would prejudice the defendant." Robinson, 967 F.2d at 291. Before a district court's denial of a continuance will be reversed, "the appellant must establish that the refusal resulted in prejudice to

his defense." United States v. Long, 706 F.2d 1044, 1053 (9th Cir. 1983).

We have reviewed the record. Although the district court did mention that Britenbach's trial counsel "voluntarily undertook the appointment," it also carefully considered the difficulty of preparation for a case of this nature and concluded that forty days was sufficient time. In denying a motion to reconsider, the district court also considered the effect of delay on judicial economy. There were sufficient legitimate reasons to justify the denial of Britenbach's motion.

Further, Britenbach's attempt to demonstrate prejudice fails. His claim of hearsay statements included co-conspirator statements that were narrative declarations, not made in

furtherance of the conspiracy. Nothing in the record suggests that longer pre-trial preparation would better enable a trial attorney to distinguish between a "mere narration" and a statement made in furtherance of a conspiracy.

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